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The Despairing Optimist

November 9, 1995

Dr. Thomas Borelli
Philip Morris Co.
120 Park Avenue
New York, New York 10017-5592

Dear Tom:

When one's efforts trigger surprising responses, it may be time for a bit of rethinking and a lot of explaining. That point was made evident by a few irate responses to our recent press conference calling for FDA consistency. If FDA bureaucrats can, with straight faces, propose to regulate tobacco as a "nicotine delivery device," then what's to stop them from regulating colas, teas, coffees, chocolate, or any other food with known "pharmacological effects"? Is "Mountain Dew" a soft drink or a "caffeine delivery device"? Under FDA's new intervention criteria, the latter answer is the right one! Indeed, any product of the "betcha can't eat just one" variety deserves to be regulated. Conceivably, running shoes could even be classified as an "endorphin boosting device."

Last month we petitioned FDA to regulate coffee, cola, and other caffeine-containing foods as drugs. Of course, we do not expect or wish our petition to be granted. Nor do we claim that regulating these products would produce any social benefits. The petition, and all the materials distributed made that point very evident. Nonetheless, FDA's tobacco proposal sets out new criteria for classifying substances as drugs and devices, and these criteria are as applicable to caffeine as they are to nicotine.

We believe that exposing the slippery-slope logic of FDA's move on tobacco, both fitting and proper, given the massive expansion in FDA's regulatory powers since David Kessler's ascension to the Administrator position. Not only has Kessler expanded FDA's authority over medical devices (an area that had been relatively free of regulatory intrusion), he has sought to restrict information about drug and device efficacy (an attempt to eliminate the one area where doctors can still exercise discretion), limit consumer access to nutritional supplements, and (most recently) shift FDA's rationale for regulation from health impacts to addictive properties. CEI's petition that FDA be consistent and regulate "caffeine delivery systems" was designed to accomplish three things: challenge the premise of FDA's latest

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regulatory expansion, alert people to the hidden risks of FDA's attack on pariah products, and redirect FDA's attention to what should be its major goal -- accelerating the approval of new medical technology.

Some of our friends reacted strongly to this action, suggesting that political theater of this sort is counter-productive and undercuts our reputation as a serious public policy institute. This letter addresses those concerns and seeks to clarify once again CEI's approach to policy. It's clear that not all our supporters have shared this understanding.

To begin with, let me review briefly the reasons why CEI was created back in that prophetic year, 1984. My work on a range of issues at the Council for a Competitive Economy had convinced me that, while economic liberty forces were mounting an increasingly effective intellectual attack, this alone would not lead to policy change -- certainly not in any rapid fashion. I noted that while the left had a shoddy policy product line, its marketing abilities were far superior to ours.

Thus, CEI was to be a different organization, bridging the gap between analysis and advocacy -- we would seek to integrate mind and muscle, if you will. Although CEI conducts substantive analytic work ("think tank" research), we see our mission as ensuring that ideas have consequences, not merely that ideas are available on the shelf. CEI seeks to move beyond the limited role of analysis, ("We published the study, it's up to them to read it!") to develop effective policy marketing strategies. An earlier Despairing Optimist letter (September, 1994) outlined our integrated strategic approach combining analysis, education, coalition building, advocacy, and litigation. As noted in that letter, CEI's *modus operandi* is rare in the free market movement -- in part because our groups have felt more secure in the "safe" intellectual world than in the messy emotional and value-laden world of activist marketing. (CEI's approach is detailed in an issue management memo, that is available upon request.)

While pioneering a new activist approach, CEI also sought to obtain broad business support for our aggressive efforts to expand the scope of economic and ecological liberty. Of course, corporations do not exist to promote ideological agendas. But the modern regulatory state has become so pervasive that most businesses would benefit from a roll back of the state in at least some areas -- or at least from preventing the state from advancing -- and therefore, some businesses should certainly constitute a base for freeing our economy. It is, however, an unstable base -- every corporation has areas where it would benefit from government intervention, and other areas where it would feel too vulnerable and seek only to avoid public controversy. My hope has been, and still is, that the remaining corporate base would still yield substantial financial support.

To some extent, this has been borne out. CEI receives a little over 30 percent of its support from corporations -- a fairly high percentage compared to most other free market groups. Moreover, that base has expanded dramatically in recent years from a handful of transportation firms to contributors in most sectors of the economy. Many business groups have come to understand the value (indeed, necessity) of independent pro-market voices and have come to support CEI or other policy groups.

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Yet, there are bound to be tensions, even conflicts, between CEI and its corporate supporters. CEI challenges the very agencies that wield regulatory authority over business. Moreover, our advocacy efforts frequently place us in the same arena as the corporate lobbyists. To minimize any downstream risk, these people usually seek to avoid notice; they rarely seek to roll back the Leviathan state. Those devoted to Marginot Line defenses are sometimes offended by our mobile thrusts and forays. Our emphasis on the strategic may also clash with their emphasis on the tactical.

Consider CEI's work on Superfund. Back in 1985-86, we said the program should be curtailed, noting that massive expenditures for "cleanup" had done nothing to advance public safety or environmental quality. That argument was swept aside in favor of the more typical Washington game of distributing the pain of the program. One idea was to create a new VAT tax to fund programs: thus, shifting the burden in part from the oil and chemical industry to business in general. CEI warned that throwing more money at Superfund would only make the program more wasteful and irrational. Our stance brought down the fury of some of our supporters, while gaining us some new supporters (the Grocery Manufacturing Association, for example).

There was no doubt that the oil and chemical industry was bearing an unfair burden. Nonetheless, we believed the correct course was not to shift that burden onto others but to oppose Superfund as a wasteful fraud. Our views were rejected as naive and presumptuous; the business lobbyists were the "experts" in this field. We lost some contributions over that stance, but given the subsequent history of Superfund, many would now agree that we were right. Neither the oil and chemical industry, nor the broader corporate community escaped higher taxes, and the legal costs associated with Superfund continued to mount. Worse, industry lost an opportunity to challenge the rationale of the entire program.

CEI has always emphasized that *we do not represent any specific company or industry, our sole goal is to advance economic freedom as effectively as possible*. The unavoidable result, however, is that CEI will on occasion find itself in conflict with our friends within the business community. We do sometimes bite the hand that feeds us. To do otherwise would be to sacrifice one of our primary values in the process -- our credibility. Many firms have come to understand that this conflict does not impair our value -- rather it strengthens it. Indeed, CEI's independence allows us to contest the moral and intellectual highground so long occupied by the regulators and their public interest supporters.

Still, it is understandable that the risks of reprisal sometimes make our policies less popular with some companies. Few business leaders are comfortable with the moral/intellectual arguments mounted by public interest groups on any side of an issue. Most business people have long adopted a "Just the Facts Ma'am" approach. Businessmen are rational -- business demands that; hence, they favor scientific and empirical arguments. That such arguments are rarely decisive in the policy arena confuses them; their only response is to call for more and better "research."

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And sometimes, of course, that is exactly what is needed -- but not often. Most public policy debates (as the Republicans have come to realize) raise moral questions about what is right and fair. This reality is not readily accepted by rationalists, who focus on the factual details. The activists, on the other hand, focus on the value dimensions and rhetoric. They win!

All this was brought into sharp relief by CEI's recent petitioning of the FDA to extend its new guidelines for non-health-based product regulation to caffeine in beverages. Some of our friends in the beverage industry were furious. But we believe that our action, by challenging the premise of FDA's latest power grab, will make the world a little safer for free enterprise and, hence, for the beverage industry as well. Regulators customarily first seek out pariah products to minimize resistance to their imperial designs, but they rarely stop restrictions on such products. Free speech defenders understand this strategy well and thus, defend the right of racists and others, recognizing that any restriction of intellectual freedom threatens us all. Economic freedoms, unfortunately, are far less well defended. There is no ACLU for economic liberty, and CEI seeks to fill that role to the best of our ability.

Our caffeine petition (copy available on request) was of course *not intended* to regulate beverages, but rather to alert the policy community and the American public to the frightening precedent FDA seeks to establish. The petition was announced at a press conference which was widely covered by both print and electronic media, and the resulting coverage was consistent with CEI's intention. No report on this project regarded our petition as anything other than tongue-in-cheek. As media advocacy, this was one of CEI's most successful efforts.

But, was this action a prudent, effective way to advance the broader cause of trimming FDA's powers? That question was raised when the press release first reached members of the Washington lobbying community and then the home offices of firms involved with caffeine products. Were we sure people would realize the petition was in jest? Wouldn't we scare some people into thinking that caffeine products are dangerous and should be regulated? Weren't such "guerrilla actions" likely to weaken the credibility of our intellectual work?

Perhaps, but I doubt it. As already noted, the news media accurately conveyed our position. In fact, we haven't found a single news report that treated our petition as seriously requesting more regulation. Its real intent was apparent to everyone, from the *National Journal* ("CEI is making a mock case") to *Advertising Age* ("CEI ... facetiously wants the FDA to look into") to *Knight Ridder* ("their tongue-in-cheek petition is little more than a political protest") to the *Associated Press* ("CEI doesn't really want caffeine regulated") to the radio reporters and talk show hosts who covered the issue. The absurdity of CEI's petition was even milked by comedian Bill Maher on his popular Comedy Central television show, *Politically Incorrect*.

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For these reasons, I also doubt that we hurt the beverage industry by mentioning caffeine and nicotine in the same breath. I'd be very surprised if a single person stopped drinking "Mountain Dew" after hearing or reading about our petition. In any event, CEI can hardly be faulted for raising an issue previously ignored by the media. This past year alone the ABC News show *20/20* twice ran a story entitled "Addicted to Caffeine". Curiously, according to ABC staff, these stories did not elicit any industry protest. Again, our action was in part designed to preempt future regulatory assaults on the beverage, or any other industry, by challenging FDA before its new intervention criteria established precedent.

Try as we might, I don't think we can totally avoid these controversies in the future. I hope our supporters recognize this -- many, after all, were attracted to CEI for exactly this sort of approach.

CEI's goal is not to fight a losing battle safely, but to turn the tables on powerful adversaries, challenging FDA's expansionary power. Resisting aggression can be risky not only to oneself, but to one's supporters and friends as well. Still, I believe we did the right thing.

Sincerely,



Fred L. Smith, Jr.
President

P.S. For those of you who are wondering how *The True State of the Planet* is doing, I am happy to report that our publisher assures us that we are outselling Gregg Easterbrook's tome. Orders have topped 20,000 copies -- four times the print run of the average think tank book. We are also aware that *True State* is slowly beginning to be adopted in college courses around the country.

Still, *True State* sales could be even better, and I hope you will help. Next time you are in a book store, ask about *True State*. If they do not have it (maybe they actually sold all their copies), ask them to order it. CEI would also encourage our supporters to donate copies of *True State* to local schools and libraries. The more library shelves our message is on, the better, and book donations are probably tax deductible. [Advertisement: Bulk order discounts are available from The Free Press, 1-800-323-7445.] CEI is thrilled that our message is getting heard more than ever before, but it needs to be heard further still. Thank you for any support you can give this effort.

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